

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
ASSOCIATION FOR MAXIMUM SERVICE	)	FOIA Control No. 2009-048
TELEVISION, INC.	)	
	)	
On Request for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** July 28, 2010

**Released:** August 2, 2010

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it an application for review (AFR) filed by the Association for Maximum Service Television, Inc. (MSTV) of the decision of the Office of Engineering and Technology (OET) denying its Freedom of Information Act (FOIA) request for a draft OET Report and related materials. We affirm the decision of OET.

**II. BACKGROUND**

2. The genesis of this FOIA proceeding is a Commission proceeding involving rules authorizing the operation of unlicensed devices on television broadcast spectrum at locations where channels are not being used for television or other authorized services (often referred to as “TV white spaces”).<sup>1</sup> As part of the *White Spaces* proceeding, OET conducted two measurement studies of prototype devices that would operate in TV white spaces.<sup>2</sup> The two studies, including the *Phase II Measurement Report* at issue here, were submitted for peer review,<sup>3</sup> a procedure “used to ensure that the quality of published information meets the standards of the scientific and technical community.”<sup>4</sup> The peer review committee issued and posted its report,<sup>5</sup> and OET issued a response that likewise was posted on the Commission

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<sup>1</sup> *Unlicensed Operation in the TV Broadcast Bands*, 23 FCC Rcd 16807 (2008) (*White Spaces*), *pet. for rev. held in abeyance sub nom. Association for Maximum Service Television, Inc., et al v. FCC and United States*, Nos. 09-1080 & 09-1118 (D.C. Cir.); *administrative petitions for reconsideration pending*, 74 FR 16870 (Apr. 13, 2009).

<sup>2</sup> See Office of Engineering and Technology “Initial Evaluation of the Performance of Prototype TV-Band White Space Devices,” OET Report FCC/OET 07-TR-1006 (July 31, 2007) (OET’s first study); Office of Engineering and Technology “Evaluation of the Performance of Prototype TV-Band White Space Devices Phase II,” OET Report FCC/OET 08-TR-1005 (Oct. 15, 2008) (OET’s second study, referred to as the *Phase II Measurement Report*). Only the second study is at issue in this FOIA proceeding.

<sup>3</sup> See *White Spaces*, 23 FCC Rcd at 16818 n.33 and 16819 n.36 (both referring to the peer review process and citing *Final Information Quality Bulletin for Peer Review*, 70 FR 2664 (2005) (*OMB Peer Review Guidelines*)); Memorandum from Julius Knapp, Chief, OET, to Jim Schlichting and George Dillon (Sept. 11, 2008), *available at* <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A4.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A4.doc)>.

<sup>4</sup> *OMB Peer Review Guidelines*, 70 FR at 2664.

<sup>5</sup> See *The FCC's Office of Engineering and Technology Releases Peer Review Panel Report on Tests of Prototype TV White Space Devices*, Public Notice, DA 09-2390, ET Docket No. 04-186 (Oct. 28, 2008) (*available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A3.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A3.doc)).

website.<sup>6</sup> OET then released and posted on the Commission's website a revised *Phase II Measurement Report*.<sup>7</sup> In the *White Spaces* decision, the Commission referred to the revised final OET report.<sup>8</sup>

3. MSTV filed a FOIA request seeking the draft *Phase II Measurement Report*<sup>9</sup> that was submitted for peer review, and "any additional materials to be added to the OET Report that were sent on or after September 11, 2008" to named FCC employees.<sup>10</sup> OET withheld the copy of the draft report submitted to peer review, and 42 emails it believed were "possibly responsive" to MSTV's FOIA request. These materials were withheld pursuant to FOIA Exemption 5<sup>11</sup> which exempts from disclosure predecisional deliberative process material.<sup>12</sup> MSTV then wrote to OET proposing that OET, "[t]o avoid further and prolonged debate over the issue, notify it in writing whether the Executive Summary [from the final *Phase II Measurement Report*], including its conclusions, were considered as part of the peer review study."<sup>13</sup> When OET did not respond before the deadline for filing an AFR for the FOIA Decision, MSTV filed an AFR of OET's FOIA Decision.<sup>14</sup>

### III. DISCUSSION

4. MSTV asserts that the records withheld did not qualify as deliberative documents under FOIA Exemption 5 because they are not predecisional or deliberative, and even if they were, the records should be released in the circumstances of the *White Spaces* proceeding.<sup>15</sup> As we discuss, the draft reports submitted for peer review fall within the deliberative process privilege of FOIA Exemption 5. Moreover, we conclude that two of the emails withheld by OET are not responsive to the MSTV FOIA request, and the remainder of the emails are properly withheld under FOIA Exemption 5. We furthermore conclude that it is not appropriate as a matter of our discretion in the circumstances of this proceeding to release any parts of the draft report submitted for peer review or of the emails.

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<sup>6</sup> See Memorandum from Julius Knapp, Chief, OET, to The Record (Oct. 28, 2008) (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A2.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A2.doc)).

<sup>7</sup> Office of Engineering and Technology, *Evaluation of the Performance of Prototype TV-Band White Space Devices Phase II*, OET Report FCC/OET 08-TR-1005 (Oct. 15, 2008) (*Phase II Measurement Report*) (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2243A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2243A3.pdf)); see *FCC's Office of Engineering and Technology Releases Report on Tests of Prototype TV White Space Devices*, 23 FCC Rcd 16007 (2008).

<sup>8</sup> See *White Spaces*, 23 FCC Rcd at 16819 citing *Phase II Measurement Report*.

<sup>9</sup> MSTV only sought the draft report for the second study. The draft report for the first study (see n.2, *supra*) was not requested as part of its FOIA.

<sup>10</sup> Email from Lindsey L. Tonsager, Covington & Burling LLP, to FOIA@fcc.gov (Oct. 29, 2008) (FOIA Control No. 2009-048).

<sup>11</sup> 5 U.S.C. § 552(b)(5).

<sup>12</sup> Letter from Julius P. Knapp, Chief, OET, to Lindsey L. Tonsager, Covington & Burling LLP (Dec. 3, 2008) (FOIA Decision). We have determined that in fact there were 41 emails.

<sup>13</sup> Letter from Jonathan D. Blake and Lindsey L. Tonsager, Covington & Burling LLP, to Julius P. Knapp, Chief, OET (Dec. 9, 2008).

<sup>14</sup> Application for Review of OET's Freedom of Information Decision by the Association for Maximum Service Television, Inc. (Dec. 31, 2008) (AFR).

<sup>15</sup> *Id.*

### A. The Draft Reports Submitted for Peer Review

5. FOIA Exemption 5 permits agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>16</sup> Exemption 5 has long been interpreted to include the deliberative process privilege, which is intended to “prevent injury to the quality of agency decisions.”<sup>17</sup> The deliberative process privilege applies to materials that are both predecisional and reflect the agency “give-and-take” of the consultative process.<sup>18</sup> The agency must establish what deliberative process is involved and the role played by the documents in the course of that process.<sup>19</sup> The draft *Phase II Measurement Report* that was submitted for peer review meets these criteria.

6. First, the report submitted for peer review was part of the deliberative process in this proceeding. OET “conducted a second phase of its study of hardware development devices with capabilities for operating on an unlicensed basis in the TV bands as part of the ‘TV white spaces’ proceeding” and provided the resulting study in the form of a “draft OET Report” to a peer review committee, as required by the *OMB Peer Review Guidelines*.<sup>20</sup> As the *OMB Peer Review Guidelines* succinctly state, peer review “is a form of deliberation involving the exchange of judgments about the appropriateness of methods and the strength of the author’s inferences. Peer review involves the review of a draft product for quality by specialists in the field who are not involved in producing the draft.”<sup>21</sup> The peer reviewers provided their comments to OET,<sup>22</sup> and OET responded.<sup>23</sup> A final report was then produced with changes from the draft report submitted for peer review.<sup>24</sup> OET’s actions are consistent with the peer review process envisioned by OMB in which “accountable agency officials must make the final decisions” on the dissemination of information after it has been peer-reviewed.<sup>25</sup> The *Phase II Measurement Report* that was provided for peer review was a non-final, draft document being considered for final issuance.<sup>26</sup> The draft *Phase II Measurement Report* therefore meets this part of the test for determining whether the deliberative process privilege applies to a particular record.

7. The draft report submitted for peer review by OET is also predecisional because it is a draft of the report that OET ultimately decided to issue. MSTV claims that the draft OET report was not predecisional because it “constitute[d] agency policy,” based on OMB’s statement in the *Peer Review Guidelines* that a document submitted for peer review “represents an official view of one or more

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<sup>16</sup> 5 U.S.C. § 552(b)(5).

<sup>17</sup> *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975) (*Sears Roebuck*).

<sup>18</sup> See *Public Citizen v. Office of Management and Budget*, 569 F.3d 434 442-43 (D.C. Cir. 2009), citing *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006).

<sup>19</sup> *Id.*

<sup>20</sup> [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A4.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A4.doc) at 1.

<sup>21</sup> *OMB Peer Review Guidelines*, 70 FR at 2665 (emphasis supplied). See also *id.* (“peer review is used “to obtain evaluations of *draft* information that contains important scientific deliberations” (emphasis supplied)).

<sup>22</sup> See [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A2.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A2.doc).

<sup>23</sup> See Memorandum from Julius Knapp, Chief, OET, to “The Record” (Oct. 28, 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A2.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A2.doc).

<sup>24</sup> See *Phase II Measurement Report*, *supra*, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2243A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2243A3.pdf).

<sup>25</sup> *OMB Peer Review Guidelines*, 70 FR at 2665.

<sup>26</sup> See *Horsehead Indus., Inc. v. EPA*, 999 F. Supp. 59, 62 (D.D.C. 1998) (indicating draft report submitted for peer review was exempt from disclosure under FOIA Exemption 5).

departments or agencies of the Federal government.”<sup>27</sup> However, the language quoted by MSTV from the *OMB Peer Review Guidelines* addressed “cases where a draft report or other information is released by an agency solely for the purposes of peer review” should be considered to be disseminating information under the data quality guidelines.<sup>28</sup> OMB recommended language to be appended to draft reports submitted to peer reviewers outside of the government to indicate the draft report “does not represent and should not be construed to represent any agency determination or policy.”<sup>29</sup> The draft *Phase II Measurement Report* did not include such language, but did not have to, inasmuch as the committee of peer reviewers for the report consisted solely of government employees.<sup>30</sup> It remained internal to the Commission and was not “disseminated” within the meaning of the data quality guidelines.<sup>31</sup> Therefore, the draft report was predecisional under the test for deliberative process for FOIA Exemption 5.

8. The Commission did not, as MSTV argues, incorporate or rely on the materials MSTV sought in its FOIA to support its decision authorizing unlicensed white space devices.<sup>32</sup> In *White Spaces*, the Commission discussed and referred to the final *Phase II Measurement Report*, which is the publicly available report issued by OET after the public peer review process.<sup>33</sup> While it is correct that under the FOIA, if an agency expressly adopts and incorporates a document into a final agency decision, the document is required to be made public,<sup>34</sup> the Commission in *White Spaces* did not incorporate or rely upon the draft report that was submitted for peer review.

9. Finally, this proceeding is unlike the situation presented in the *ARRL* case cited by MSTV.<sup>35</sup> In *ARRL*, the Commission had not placed in the record an unredacted report on broadband over power lines, but relied on the unredacted report in its decision. The court on review reversed, indicating that because the unredacted report was relied upon, it should have been placed in the record for all parties to review and comment upon. In contrast, in the *White Spaces* proceeding, OET placed in the record the complete final *Phase II Measurement Report*.<sup>36</sup> It is the final public report to which the Commission

<sup>27</sup> AFR at 5, citing *OMB Peer Review Guidelines*, 70 FR at 2667.

<sup>28</sup> The Data Quality Act (DQA), Section 515(a) of the Treasury and Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000), reprinted at 44 U.S.C.A. § 3516 note, was implemented by the Commission in *Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, 17 FCC Rcd 19890 (2002) (FCC DQA Guidelines). The DQA was enacted to ensure the “quality of governmental information disseminated to the public.” *Id.*, 17 FCC Rcd at 19890.

<sup>29</sup> *OMB Peer Review Guidelines*, 70 FR at 2667. The concern being addressed by OMB flowed from the situations where a draft agency report is provided to outside peer reviewers, and, if so, OMB advises that the draft should be marked appropriately to indicate it is not a final report being disseminated by the government.

<sup>30</sup> See Peer Review Panel Report on OET Report FCC/OET 08-TR-1005 Evaluation of the Performance of Prototype TV-Band White Space Devices Phase II (Oct. 1, 2008) (Peer Review Report) (naming peer reviewers, all of whom are Commission employees), available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2390A3.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2390A3.doc)>. See also 47 C.F.R. § 19.735-203(a) (nonpublic information may not be disclosed outside of the FCC without prior authorization).

<sup>31</sup> *OMB Peer Review Guidelines*, 70 FR at 2667. (“The term ‘dissemination’ means agency initiated or sponsored distribution of information to the public. Dissemination does not include distribution limited to government employees . . .”).

<sup>32</sup> AFR at 5.

<sup>33</sup> See n.6, *supra*.

<sup>34</sup> See, e.g., *Sears Roebuck*, 421 U.S. at 161.

<sup>35</sup> *American Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008) (*ARRL*).

<sup>36</sup> See nn. 6-8, *supra*.

referred in the *White Spaces* decision.<sup>37</sup>

## B. Miscellaneous Records

10. MSTV's initial FOIA also requested "any additional materials to be added to the OET report that were sent on or after September 11, 2008, to any of the recipients" of the memorandum instituting the peer review process or persons who conducted the peer review of the *Phase II Measurement Report*.<sup>38</sup> OET identified 42 emails that it believed were "possibly responsive" to this part of the FOIA request, and withheld them pursuant to FOIA Exemption 5.<sup>39</sup> MSTV's AFR refers to but does not discuss these documents, but we have nonetheless reviewed them to determine if they are indeed responsive to the FOIA request, and, if so, whether they are protected from release by FOIA or should be released to MSTV.

11. Our review of the emails indicates that one email (and a copy of the email that is part of another email chain) is dated September 10, 2008. It is therefore not within the scope of the FOIA request, since MSTV seeks materials sent on or after September 11, 2008. One additional email and an attachment are also not within the scope of the FOIA request because they do not contain any information "to be added to the OET report."<sup>40</sup> The remainder of the emails and attachments, while responsive to the FOIA request, are exempt from disclosure under the deliberative process privilege of FOIA Exemption 5.<sup>41</sup> The emails are internal communications to, from, between or among OET staff and the peer reviewers. They discuss changes suggested by the peer review committee members, and reactions to those changes. The emails predate the final *Phase II Measurement Report* and thus are predecisional as well as deliberative. As such, the emails are models of the "give and take" that the deliberative process privilege is meant to protect.<sup>42</sup>

## C. Discretionary Release/Segregation

12. MSTV proffers two policy arguments why it believes that the deliberative process privilege should not be involved with respect to the draft report. First, it argues that the deliberative process privilege should not be applied here because "there is reason to believe the documents sought may shed light on governmental misconduct . . . on the grounds that shielding internal government deliberations in this context does not service the public's interest in honest, efficient government."<sup>43</sup> Some draft Commission reports submitted to peer review are publicly available, and some are not. In this instance, the report was submitted to a peer review committee consisting entirely of FCC employees, and thus was wholly an internal document. Moreover, the draft report at issue here was more than a scientific study as it included characteristics of a draft policy study. The final report and the *White Spaces* decision, not the draft report, reflect the Commission's position on those matters. To protect the free flow of information in the Commission's internal deliberative processes, we will not exercise our discretionary power to

<sup>37</sup> See, e.g., *White Spaces*, 23 FCC Rcd at 16818, 16819.

<sup>38</sup> FOIA Request at 1.

<sup>39</sup> FOIA Decision at 1. We have determined that in fact there were forty-one emails.

<sup>40</sup> FOIA Request at 1.

<sup>41</sup> See paragraph 5, *supra*.

<sup>42</sup> See *Public Citizen*, 569 F.3d at 442-43; *Judicial Watch*, 449 F.3d at 151.

<sup>43</sup> AFR at 8-9, quoting *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (internal quotation marks omitted). MSTV claims there are "inconsistencies" between the Executive Summary and the body of the report (AFR at 9), but this FOIA proceeding is not the appropriate place for raising this issue. See paragraph 8 & n.32, *supra*.



release the draft report on the facts presented here.<sup>44</sup>

13. Second, MSTV argues that it is inappropriate to invoke Exemption 5 where questions of compliance with peer review or the DQA exist.<sup>45</sup> MSTV also argues that the records sought are “critical to determining the validity of the technical foundation for the Commission’s White Spaces Decision.”<sup>46</sup> This is not the proper proceeding to raise such concerns. Any challenge to the *Phase II Measurement Report* under the Administrative Procedure Act, the DQA or OMB’s peer review guidelines should have been filed by MSTV in the White Spaces rulemaking proceeding, not in this FOIA proceeding.<sup>47</sup> This is especially true when the Commission is considering numerous petitions for reconsideration of those rules and the judicial challenge to those rules is being held in abeyance pending the decision on reconsideration. We thus determine that MSTV has not made a persuasive case that the harms resulting from discretionary release in this instance should be incurred as a matter of the Commission’s discretion.

14. IT IS ORDERED that the application for review by the Association for Maximum Service Television, Inc. IS DENIED . MSTV may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

15. The officials responsible for this action are the following Commissioners: Chairman Genachowski, Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>44</sup> See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 FR 4683 (2009) (President Obama’s memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder’s FOIA Memo).

<sup>45</sup> AFR at 8-10.

<sup>46</sup> *Id.* at 7-8.

<sup>47</sup> As the Commission observed in the FCC DQA Guidelines, “If affected persons are concerned about information disseminated in the context of a rulemaking proceeding, such concerns should be raised as comments in the rulemaking process.” 17 FCC Rcd at 19892 and Guidelines at Section IV.1.b., 17 FCC Rcd at 19898. We note that neither the DQA nor the peer review guidelines create a private right of action. *OMB Peer Review Guidelines*, 70 FR at 2677 (“This [Peer Review] Bulletin . . . does not create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person.”); *Salt Institute v. Thompson*, 345 F.Supp.2d 589, 601 (E.D. Va. 2004) (no private right of action under the DQA), *aff’d sub nom. Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006).